IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 33976

SHEY MARIE SCHOGER,	)	
	)	**2008 Opinion No. 82**
Petitioner-Appellant,	)	
	)	**Filed: August 26, 2008**
v.	)	
	)	**Stephen W. Kenyon, Clerk**
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Joel D. Horton, District Judge.

Order summarily dismissing application for post-conviction relief, affirmed in part, reversed in part, and remanded.

Nevin, Benjamin, McKay & Bartlett, LLP, Boise, for appellant. Dennis A. Benjamin argued.

Hon. Lawrence G. Wasden, Attorney General; Jennifer Birkin, Deputy Attorney General, Boise, for respondent. Jennifer Birkin argued.

PERRY, Judge

Shey Marie Schoger appeals from the district court's order summarily dismissing her application for post-conviction relief. Specifically, Schoger asserts that she raised a genuine issue of material fact as to whether her trial counsel provided ineffective assistance in preparing her to plead guilty, whether the district court erred in rejecting her guilty plea, and whether her appellate counsel provided ineffective assistance in failing to challenge the district court's rejection of her guilty plea. For the reasons set forth below, we affirm in part, reverse in part, and remand for further proceedings.

I.

FACTS AND PROCEDURE

The police executed a search warrant for the residence of Schoger and her boyfriend. Based on the state's evidence at Schoger's trial, the police found substantial quantities of illegal drugs and drug paraphernalia in the master bedroom of the residence, including over 1,000 grams

of methamphetamine in different locations and many plastic baggies of psilocybin mushrooms in a briefcase. Police also searched a detached garage and found substantial quantities of marijuana. Additionally, the police searched Schoger's vehicle when she arrived during execution of the warrant and found that Schoger's purse contained psilocybin mushrooms and approximately 27 grams of methamphetamine.[1] The state charged Schoger with trafficking in methamphetamine in an amount of 400 grams or more, I.C. §37-2732B(a)(4); possession of marijuana with intent to deliver, I.C. § 37-2732(a); and possession of psilocybin with intent to deliver, I.C. § 37-2732(a). Schoger filed a motion to suppress, which the district court denied.

The parties reached a plea agreement and presented it to the district court. Pursuant to the agreement, Schoger would plead guilty to an amended charge of trafficking in methamphetamine in the amount of 200 to 400 grams. In exchange, the state would dismiss the remaining charges and recommend the mandatory minimum fine of $15,000, and the mandatory minimum sentence of five years, to be followed by an unspecified indeterminate term.

After a brief colloquy with Schoger, the district court determined that Schoger's plea was voluntary and that she committed the crime of trafficking in an amount between 200 and 400 grams, but the district court indicated that it wanted to ask "a couple follow-up questions." The district court questioned Schoger regarding her possession of the methamphetamine. Schoger stated that she had 56 grams of methamphetamine on her person. Schoger also indicated that there was more than 200 grams of methamphetamine in the bedroom of her residence. The district court asked if Schoger had the intention to exercise control over the methamphetamine in the bedroom and, after Schoger conferred with counsel, counsel stated:

> Judge, with regard to the methamphetamine that was in the house, primarily [Schoger's boyfriend] was the person that was handling that methamphetamine. Ms. Schoger indicates that he would basically keep it hidden from Ms. Schoger. However, that she did reside in the residence, and we strongly believe that the state is going to be able to prove constructive possession if this matter does proceed to trial.
>
> And so with regard to the quantity that is within the house, Ms. Schoger admits to constructively possessing that and would ask the court to continue to proceed forward with her plea in terms of 200 grams or more.

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[1] In the vehicle, the police also found a separate quantity of a substance believed to be methamphetamine, which was not admitted into evidence at trial.

The district court then commented that it had asked the follow-up questions because it noticed some reticence on Schoger's part and that it was nervous to see Schoger looking to counsel for answers. The district court conducted the following colloquy:

> DISTRICT COURT: So you can just tell me right now, did you know it was there or did you only possess 56 grams that you told me about at first?
> SCHOGER: Yes. Yes. It was in the house and—
> DISTRICT COURT: And you knew about it?
> SCHOGER: I didn't know, I didn't know that much, but I knew there was some in there.
> DISTRICT COURT: Did you have the intention to exercise control over it?
> SCHOGER: No.

The district court then refused to accept the guilty plea. Defense counsel asked if the district court would accept the plea as an *Alford*[2] plea, and the district court indicated that it would not. Subsequently at the same hearing, counsel informed the district court that Schoger had "reiterated a desire to plead guilty to the charge, to admit to all the facts." The district court reconfirmed its position that it was uncomfortable accepting Schoger's guilty plea and rejected Schoger's renewed attempt to plead guilty to the amended charge.

The case proceeded to trial on the original charges. At the close of the state's evidence, Schoger moved for a judgment of acquittal. The district court granted Schoger's motion as to possession of marijuana with intent to deliver, but denied the motion as to the remaining charges. The jury found Schoger guilty of trafficking in methamphetamine in an amount of 400 grams or more and of possession of psilocybin with intent to deliver. Schoger renewed her motion for judgment of acquittal for trafficking in methamphetamine. The district court again denied the motion. The district court sentenced Schoger to fifteen years, with a minimum period of confinement of ten years, for trafficking in methamphetamine and 219 days for possession of psilocybin, with credit for 219 days that she served in the county jail during the criminal proceedings. The district court also imposed a fine of $25,000. Schoger appealed, challenging only the reasonableness of her sentence. This Court affirmed the sentence in an unpublished opinion. *State v. Schoger*, Docket No. 31407 (Ct. App. Mar. 15, 2006).

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[2] *See North Carolina v. Alford*, 400 U.S. 25 (1970).

Schoger filed a pro se application for post-conviction relief wherein she alleged ineffective assistance of trial counsel for failure to explain the elements of possession prior to her attempt to plead guilty. The district court appointed post-conviction counsel, and Schoger filed an amended application with the assistance of counsel. The amended application set forth a claim of ineffective assistance of trial counsel substantially similar to that in the initial application. Additionally, Schoger alleged that the district court erred in rejecting the guilty plea and appellate counsel provided ineffective assistance by failing to challenge the district court's rejection of the guilty plea. The state filed an answer and a motion for summary dismissal. After a hearing on the state's motion, the district court accepted additional briefing. The district court then issued a decision ruling that the state was entitled to summary dismissal and, twenty days later, issued an order summarily dismissing Schoger's amended application. Schoger appeals.

II.
STANDARD OF REVIEW

An application for post-conviction relief initiates a proceeding that is civil in nature. *State v. Bearshield*, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); *Clark v. State*, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969); *Murray v. State*, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct. App. 1992). Like a plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990). An application for post-conviction relief differs from a complaint in an ordinary civil action. An application must contain much more than "a short and plain statement of the claim" that would suffice for a complaint under I.R.C.P. 8(a)(1). Rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application. I.C. § 19-4903. In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.

Idaho Code Section 19-4906 authorizes summary dismissal of an application for post-conviction relief, either pursuant to motion of a party or upon the court's own initiative. Summary dismissal of an application pursuant to I.C. § 19-4906 is the procedural equivalent of summary judgment under I.R.C.P. 56. Summary dismissal is permissible only when the

applicant's evidence has raised no genuine issue of material fact that, if resolved in the applicant's favor, would entitle the applicant to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. *Gonzales v. State*, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991); *Hoover v. State*, 114 Idaho 145, 146, 754 P.2d 458, 459 (Ct. App. 1988); *Ramirez v. State*, 113 Idaho 87, 89, 741 P.2d 374, 376 (Ct. App. 1987). Summary dismissal of an application for post-conviction relief may be appropriate, however, even where the state does not controvert the applicant's evidence because the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994); *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986).

On review of a dismissal of a post-conviction relief application without an evidentiary hearing, we determine whether a genuine issue of fact exists based on the pleadings, depositions, and admissions together with any affidavits on file; moreover, the court liberally construes the facts and reasonable inferences in favor of the nonmoving party. *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993).

III.
ANALYSIS

A. Direct Challenge to Rejection of Guilty Plea

Schoger alleges that she adequately asserted a claim that the district court erred in refusing to accept her guilty plea. The district court did not address this claim independent of the ineffective assistance of appellate counsel claim. On appeal, the state asserts, as it did below, that Schoger may not directly challenge the district court's rejection of her guilty plea in post-conviction proceedings because the issue should have been raised in her direct appeal.

The scope of post-conviction relief is limited. *Knutsen v. State*, 144 Idaho 433, 438, 163 P.3d 222, 227 (Ct. App. 2007). An application for post-conviction relief is not a substitute for an appeal.

> Any issue which could have been raised on direct appeal, but was not, is forfeited and may not be considered in post-conviction proceedings, unless it appears to the court, on the basis of a substantial factual showing by affidavit, deposition or otherwise, that the asserted basis for relief raises a substantial doubt about the reliability of the finding of guilt and could not, in the exercise of due diligence, have been presented earlier.

I.C. § 19-4901(b). Schoger has not asserted that she was unable, with the exercise of due diligence, to challenge the district court's rejection of her guilty plea on direct appeal. Indeed, Schoger asserts that the failure to present the claim on direct appeal was due to the inadequacies of appellate counsel. Thus, we will address this claim only within the context of Schoger's claims of ineffective assistance of counsel.

B. Ineffective Assistance Claims

A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Murray v. State*, 121 Idaho 918, 924-25, 828 P.2d 1323, 1329-30 (Ct. App. 1992). To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient and that the defendant was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). To establish a deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). To establish prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. *Aragon*, 114 Idaho at 761, 760 P.2d at 1177. This Court has long-adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law or other shortcomings capable of objective evaluation. *Howard v. State*, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994).

1. Ineffective assistance of trial counsel

In her pro se application, after reiterating that she had expressed willingness to the district court to accept the plea bargain, Schoger recounted:

> When [the district court] asked me if I was in possession of 200 grams but no more than 400 grams I looked at my attorney in confusion because I was unsure of the answer. I then stated no. [T]he judge then asked me what I was in possession of and I told him 52 grams. After a lot of confusion and me looking at my attorney for some sort of answers, [the district court] wouldn't let me enter a plea of guilty. . . .

She asserted that during her colloquy with the district court she became confused as to the meaning of possession. Specifically, Shoger alleged:

> I looked at my attorney and had asked him what went wrong and why did I have to go to trial. He stated that it was because I didn't say that I was in

> possession of 200 grams but no more than 400 grams. I looked at him and said I wasn't in possession of that. I told the judge what I was in possession of. I was very confused and upset because I didn't understand what was happening. [My attorney] then explained [constructive possession] to me. . . . I looked at him and asked why none of this has been explained to me. . . . I strongly feel that if I had been explained the process of entering a plea and what would be expected to be asked by the judge that I would be serving a sentence that had been offered by the state and would not have had to proceed to trial . . . .

The district court ruled that Schoger satisfied the deficient performance prong by alleging trial counsel failed to inform her of the elements of the amended charge but that Schoger could not establish prejudice. The district court reasoned that Schoger denied any intent to exercise control over the methamphetamine in the bedroom when the district court directly questioned her during the plea colloquy. Thus, even with adequate advice, Schoger would not have voluntarily admitted to the elements of constructive possession of the methamphetamine in the bedroom. According to the district court, the only way counsel could have changed the outcome of the plea hearing would have been to persuade Schoger to falsely testify as to her intent to possess the methamphetamine found in the bedroom.

Schoger now asserts that, with proper knowledge of the elements of constructive possession, she would have informed the district court that she had the requisite intent. The colloquy demonstrates that the district court was not willing to accept the plea unless Schoger admitted to having such intent. Schoger did not specifically allege in her post-conviction pleadings that she ever intended to exercise control over the methamphetamine found in the bedroom or that she would have admitted to the district court the necessary intent element during the plea colloquy if counsel had properly advised her. However, liberally construing the facts and reasonable inferences in favor of Schoger, her statements are sufficient to raise an inference that she would have admitted to constructively possessing the methamphetamine in the residence had she adequately understood the legal concept.[3] Therefore, the district court erred in determining that Schoger failed to show prejudice resulting from trial counsel's deficient

[3] As noted, the district court reasoned that Schoger could not admit the requisite intent without committing perjury. We are unpersuaded. Had counsel adequately advised Schoger of the legal principle of constructive possession, Schoger perhaps would have truthfully admitted being in constructive possession.

performance and in summarily dismissing her application for relief for ineffective assistance of trial counsel. We remand this case for an evidentiary hearing on this issue.

2. Ineffective assistance of appellate counsel

Schoger claims that appellate counsel provided ineffective assistance by failing to challenge the district court's rejection of her attempt to enter an *Alford* plea. According to Schoger, I.C.R. 11 required acceptance of the plea or, alternatively, the district court abused its discretion in rejecting the plea. The state asserts that these arguments would have failed on appeal because the district court properly rejected the plea when Schoger's proffered factual basis for the plea was inconsistent with actual guilt.[4]

Claims that appointed counsel should have raised certain additional issues on appeal are subject to the standards set forth in *Strickland*. *Mintun v. State*, 144 Idaho 656, 661, 168 P.3d 40, 45 (Ct. App. 2007). An indigent defendant does not have a constitutional right to compel appointed appellate counsel to press all nonfrivolous arguments that the defendant wishes to pursue. *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *Mintun*, 144 Idaho at 661, 168 P.3d at 45. Rather, the process of winnowing-out weaker arguments on appeal and focusing on those more likely to prevail, far from being the evidence of incompetence, is the hallmark of effective appellate advocacy. *Smith v. Murray*, 477 U.S. 527, 536 (1986); *Mintun*, 144 Idaho at 661, 168 P.3d at 45. It is possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent. *Smith v. Robbins*, 528 U.S. 259, 288 (2000); *Mintun*, 144 Idaho at 661, 168 P.3d at 45. Only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome. *Smith*, 528 U.S. at 288; *Mintun*, 144 Idaho at 661, 168 P.3d at 45. The relevant inquiry on the prejudice prong in relation to appellate counsel is whether there is a reasonable possibility that, but for counsel's errors, the applicant would have prevailed

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[4] The state also asserts that Schoger did not raise in the district court her current argument that counsel should have argued on appeal that Rule 11 required the district court to accept the guilty plea. It appears, however, from the district court's decision that Schoger argued, in briefing to the district court not included in the record before us, that the district court was required to accept the guilty plea. Furthermore, at the hearing on the motion for summary dismissal, Schoger's counsel asserted that a defendant has a constitutional right to plead guilty. Although Schoger now relies on Rule 11 as the basis for her argument, we conclude that she adequately preserved for appeal the claim that appellate counsel should have argued Rule 11 required acceptance of plea.

on appeal. *Smith*, 528 U.S. at 285. *See also Mintun*, 144 Idaho at 665, 168 P.3d at 49. Thus, we must analyze whether there is a reasonable probability that Schoger would have prevailed with such a challenge on appeal.

The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called "plea bargaining," is an essential component of the administration of justice. *Santobello v. New York*, 404 U.S. 257, 260 (1971); *State v. Horkley*, 125 Idaho 860, 862, 876 P.2d 142, 144 (Ct. App. 1994). Properly administered, it is to be encouraged. *Santobello*, 404 U.S. at 260; *Horkley*, 125 Idaho at 862, 876 P.2d at 144. Idaho recognizes guilty pleas obtained through the plea bargaining process and sets forth the requirements and procedures relating to such pleas in Rule 11. *Horkley*, 125 Idaho at 862, 876 P.2d at 144. *See also* I.C.R. 11(c). Among those requirements, a court must ensure that all guilty pleas are made knowingly and voluntarily so as to not violate the defendant's constitutional right against being compelled or coerced to bear witness against himself or herself in a criminal case. *State v. Salisbury*, 143 Idaho 476, 478, 147 P.3d 108, 110 (Ct. App. 2006). *See also Brady v. United States*, 397 U.S. 742, 748 (1970).

In *North Carolina v. Alford*, 400 U.S. 25 (1970), the United States Supreme Court considered whether a defendant's entry of a guilty plea to second degree murder, accompanied by assertions of innocence, was voluntary and therefore not compelled within the meaning of the Fifth Amendment to United States Constitution. The Court held that, while most guilty pleas include an admission of factual guilt along with the waiver of trial, such an admission was not a constitutional requirement to the imposition of a prison sentence so long as the guilty plea was entered voluntarily, knowingly, and intelligently. *Id.* at 37. The Court concluded that, in view of the strong factual basis for the plea demonstrated by the state and Alford's clearly expressed desire to enter it despite his professed belief in his innocence, the trial judge did not commit constitutional error in accepting it. *Id.* at 38. However, the Court in *Alford* limited its holding when it stated in a footnote:

> Our holding does not mean that a trial judge must accept every constitutionally valid guilty plea merely because a defendant wishes so to plead. A criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the court, . . . although the States may by statute or otherwise confer such a right. Likewise, the States may bar their courts from accepting guilty pleas from any defendants who assert their innocence.

Id. at 38 n.11. A defendant does not, therefore, have a federal constitutional right to enter an *Alford* plea, and individual states are free to determine whether to confer such a right.

The Idaho appellate courts have long-endorsed the use of *Alford* pleas when there is a strong factual basis for the plea and the defendant understands the charges, but continues to claim that he or she is innocent. *See State v. Dopp*, 124 Idaho 481, 485 n.1, 861 P.2d 51, 55 n.1 (1993); *Sparrow v. State*, 102 Idaho 60, 61, 625 P.2d 414, 415 (1981); *Salisbury*, 143 Idaho at 479, 147 P.3d at 111; *State v. Leon*, 142 Idaho 705, 707 n.1, 132 P.3d 462, 464 n.1 (Ct. App. 2006); *State v. Jones*, 129 Idaho 471, 474, 926 P.2d 1318, 1321 (Ct. App. 1996); *Horkley*, 125 Idaho at 862, 876 P.2d at 144. This Court has held that a trial court's decision whether to accept guilty pleas from defendants who assert their innocence is a discretionary one. *Jones*, 129 Idaho at 474, 926 P.2d at 1321.

We first conclude that Schoger is incorrect that she was likely to prevail on appeal with a theory that Rule 11 required the district court to accept her *Alford* plea. Rule 11(a) provides that a "defendant may plead guilty or not guilty." Other sections of Rule 11, however, place conditions on acceptance of a guilty plea. *See* I.C.R. 11(c). The rule thus requires trial courts to reject a proffered guilty plea when these conditions are not met and does not require a trial court to accept any plea bargain presented by the parties. Furthermore, in *Jones*, this Court held that a trial court's decision of whether to accept an *Alford* plea is a discretionary decision. *Jones*, 129 Idaho at 474, 926 P.2d at 1321. In that case, Jones asserted the trial court denied his due process rights by accepting his *Alford* plea and then imposing a condition of probation which required that he admit guilt in order to complete the mandated sexual abuse counseling. In rejecting Jones's argument, we also noted that "the trial court's refusal to accept Jones's *Alford* plea would have been appropriate under the circumstances of this case." *Id.* We are not, therefore, persuaded by Schoger's reliance on cases from other jurisdictions applying rules similar to our Rule 11, and we conclude that Schoger would not have prevailed on appeal with this argument.

We must next determine whether Schoger would likely have prevailed on appeal with an argument that the district court abused its discretion in rejecting her *Alford* plea. When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether

the lower court reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989).

The majority of federal circuit courts have held a trial court has discretion to reject a guilty plea solely because the defendant protests innocence. *See United States v. Buonocore*, 416 F.3d 1124, 1131 (10th Cir. 2005); *United States v. Preciado*, 336 F.3d 739, 743 (8th Cir. 2003); *United States v. Cox*, 923 F.2d 519, 526 (7th Cir. 1991); *United States v. Gomez-Gomez*, 822 F.2d 1008, 1011 (11th Cir. 1987); *United States v. O'Brien*, 601 F.2d 1067, 1070 (9th Cir. 1979); *United States v. Bednarski*, 445 F.2d 364, 366 (1st Cir. 1971). Furthermore, many state courts that recognize *Alford* pleas permit trial courts to exercise broad discretion in determining when to accept such pleas. *See, e.g., Farley v. Glanton*, 280 N.W.2d 411, 415 (Iowa 1979); *State v. Clanton*, 612 P.2d 662, 667 (Kan. Ct. App. 1980); *Commonwealth v. Souza*, 461 N.E.2d 166, 170 (Mass. 1984); *State v. Leisy*, 295 N.W.2d 715, 719 (Neb. 1980); *State v. Jackson*, 366 A.2d 148, 150 (R.I. 1976); *State v. Paris*, 578 S.E.2d 751, 752 (S.C. Ct. App. 2003).

The leading case supporting Schoger's argument is *United States v. Gaskins*, 485 F.2d 1046 (D.C. Cir. 1973). There, the court held:

> When the trial judge is presented with a "factual basis for the plea", as there surely was in this case where there was strong factual evidence implicating defendant, an intelligent and voluntary counseled plea should not be refused simply because the defendant who is willing to enter a plea of guilty is unable or unwilling to testify to his guilt in factual terms. The entry of such a plea of guilty in such a situation is not contrary to the interests of justice. Rule 11 was intended for the protection of the defendant, and does not require a denial to the defendant of the opportunity to act in his own best interest, as advised by his trial counsel.

Gaskins, 485 F.2d at 1049 (footnote omitted). *See also United States v. Ammidown*, 497 F.2d 615, 618 (D.C. Cir. 1973). Likewise, at least one state court has held that it is an abuse of a trial court's discretion to reject a guilty plea solely on the basis that the defendant refuses to admit he or she committed the charged offense. *See State v. Parr*, 542 S.E.2d 69, 73 (W.Va. 2000) (trial judge abused discretion by rejecting *Alford* plea after trial court stated on the record its general policy of rejecting *Alford* pleas as unjust); *Kennedy v. Frazier*, 357 S.E.2d 43, 45 (W.Va. 1987) (trial court abused its discretion in refusing *Alford* plea to vindicate *defendant's* rights).

We conclude that Schoger failed to allege a viable claim of ineffective assistance of appellate counsel. First, Schoger cites no Idaho appellate court decisions reversing a trial court's rejection of a proffered *Alford* plea. In light of the lack of favorable Idaho precedent, counsel did

not perform deficiently in failing to recognize and raise this issue of first impression on appeal. *See State v. Mathews*, 133 Idaho 300, 308, 986 P.2d 323, 331 (1999). Furthermore, Schoger has not shown prejudice by demonstrating she likely would have succeeded on appeal with such a challenge. The majority of courts to address the issue have permitted trial courts to reject *Alford* pleas solely based on the defendant's inability or unwillingness to admit guilt. The district court did not state during the plea colloquy that it lacked discretion to accept an *Alford* plea but, rather, appears to have correctly recognized that the decision of whether to accept the guilty plea was within its discretion. The district court expressed concern about the voluntariness of Schoger's plea because she continued to look to counsel throughout the plea colloquy for answers. Under these circumstances, an appellate court was very likely to defer to the district court's discretionary decision not to accept Schoger's *Alford* plea.

IV.
CONCLUSION

Schoger waived a direct challenge to the district court's rejection of her guilty plea by not raising such a challenge in the direct appeal from her criminal trial. The district court properly dismissed Schoger's claim of ineffective assistance of appellate counsel. The district court erred, however, in ruling that Schoger failed to raise a genuine factual issue on her claim of ineffective assistance of trial counsel because her pleadings adequately allege a material issue of fact as to whether she would have admitted constructive possession of methamphetamine had she been properly advised by counsel. We therefore affirm the district court's order summarily dismissing Schoger's application for post-conviction relief in part and reverse in part, and remand for further proceedings consistent with this opinion. Costs, but not attorney fees, are awarded to appellant.

Chief Judge GUTIERREZ and Judge LANSING, **CONCUR.**